A further point of criticism of the prosecution's case was that the identification depended solely upon one person, namely the complainant, and was made when the accused was surrounded by a group of people and obviously at that moment, regarded by every one in the vicinity as being responsible for the theft. An identification made in such circumstances cannot be regarded as very satisfactory or reliable.

In view of the matters referred to above, I came to the conclusion that the prosecution's case had not been satisfactorily proved and accordingly I allowed the appeal.

Appeal allowed.

LYN HONG YAP v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Brown Ag. C.J. (S) and Wilson J.) December 2, 1953]

[K. L. — F.M. Criminal Reference No. 2 of 1953]

Prevention of Corruption Ordinance, 1950, s. 12 — Criminal Procedure Code (Cap. 6), s. 422 — Consent of Public Prosecutor — Validity of consent — Whether want of consent curable — Practice where a consent or sanction is required.

In this case the facts proved at the time relating to the question of consent were as follows: On June 13, 1952 the Police applied to the Magistrate at Kuala Kangsar for a summons to issue against the appellant in respect of an offence committed "on a day between 17th and 19th April 1952". On June 19 the Magistrate made an order for the Summons to issue and it was issued on June 21. On July 1, the Dy. Public Prosecutor signed a document of consent under section 12 of the Prevention of Corruption Ordinance. The charge to which the appellant was called on to plead on July 3 and on which he was tried was that he had committed an offence under section 3(b) of the said Ordinance and punishable under section 3(c). Throughout the trial in the Sessions Court not a word was said by either of the two counsel who at different times represented the appellant as to the validity of the consent of the Public Prosecutor or as to any want of consent. The point was raised for the first time at the hearing of the second appeal and then in answer to a question of Thomson J. the Dy. Public Prosecutor informed the Court after going through his papers that his colleague in office who had signed the consent of July 1, 1952 had in fact given his consent to the institution of the proceedings and indeed had instructed them to be instituted on June 2, 1952, that was some eleven days before the application for process by the Police.

Thomson J. accepted this assurance and dismissed the appeal. The learned Judge held that the want of consent under section 12 of the Prevention of Corruption Ordinance is not an omission that can be cured by reason of section 422 of the Criminal Procedure Code.

The Court of Appeal agreed with the decision of Thomson J. and held that the consent of the Public Prosecutor in this case was not defective, and that the trial of the appellant was not a nullity.

The Court of Appeal further suggested that difficulties which might arise in cases where a consent or sanction is required, could be avoided if the practice were adopted on accompanying every application for a summons or a warrant of arrest with the consent or sanction in writing.

Cases referred to:—

(1) *R. v. Bates* 6 Cr. App. R. 153.
(2) *R. v. Metz* 11 Cr. App. R. 164.
(3) *Hori Ram Singh v. R.* A.I.R. 1939 P.C. 43, 50.
(4) *Gill v. R.* A.I.R. 1948 P.C. 128, 133.
(5) *Morarka v. R.* A.I.R. 1948 P.C. 82.
(6) *Chong Tuck Loong v. Public Prosecutor* Perak Cr. App. No. 73/1952 — Unreported.

The judgment of the Court below was as follows:

Thomson J.:— The appellant in this case appeared before the Sessions Court at Kuala Kangsar on 3rd July, 1952, charged with an offence in contravention of section 3(b) of the Prevention of Corruption Ordinance, 1950. He claimed trial and was represented by Counsel. At the close of the case for the prosecution the learned President decided that there was no case to answer and acquitted and discharged him.

Against that order of acquittal and discharge the Public Prosecutor appealed and on 18th December, 1952, the appeal was allowed, the order of acquittal was set aside and the case was remitted to the Sessions Court to be further dealt with according to law. I am not concerned here with the matters that were at issue in that appeal.

On 22nd January, 1953, the case again came before the Sessions Court when the appellant was represented by a different Counsel. In the event, the appellant was convicted and fined $750 or nine months rigorous imprisonment in default of payment.

Against that conviction appellant appealed on a number of grounds the only ones of which I am concerned with here being certain grounds relating to the question of whether the consent of the Public Prosecutor given under section 12 of the Prevention of Corruption Ordinance was defective and whether therefore the Sessions Court was without jurisdiction and the trial was therefore a nullity.

The facts proved at the time relating to this question of consent are as follows.

On 13th June, 1952, the Police applied to the Magistrate at Kuala Kangsar for a summons to issue against the appellant in respect of an offence committed "on a day between 17th and 19th April, 1952". On 19th June the Magistrate made an order for the summons to issue and it was issued on 21st June. On 1st July, the Deputy Public Prosecutor signed a document in the following terms:—

Consent under Section 12.

"Under the provisions of section 12 of the Prevention of Corruption Ordinance, 1950, I, Matthew Gilbert Neal, Deputy Public Prosecutor, Perak, hereby consent to the

prosecution of one LYN HONG YAP for an offence punishable under section 3(b) of the aforesaid Ordinance, alleged to have been committed at Liman, Kati, Kuala Kangsar, between 19th - 20th April, 1952.

Dated at Ipoh this 1st day of July, 1952.

(Sd.) M. G. Neal,
Deputy Public Prosecutor,
Perak."

and the charge to which the appellant was called on to plead on 3rd July and on which he was tried was as follows :—

"That you on a day between 17th and 20th April, 1952 at 1.30 p.m. at No. 5 New Village, Liman Kati, in the district of Kuala Kangsar did corruptly agree to give a sum of $50 to an agent, namely, K. Retnasingam, Health Inspector, as an inducement to him to show favour to one Lee Kow in a matter in relation to the said K. Retnasingam's principal affairs, namely, to grant the said Lee Kow a licence for Coffee and eating shop and that you have thereby committed an offence under Section 3(b) of Prevention of Corruption Ordinance No. 5 of 1950 and punishable under Section 3(c) of the same Ordinance."

Throughout the trial in the Sessions Court not a word was said by either of the two Counsel who at different times represented the appellant as to the validity of the consent of the Public Prosecutor or as to any want of consent. The point was raised for the first time at the hearing of the second appeal and then in answer to a question by myself the Deputy Public Prosecutor who was appearing for the respondent informed me after going through his papers that his colleague in office who had signed the paper bearing the date 1st July, 1952, had in fact given his consent to the institution of the present proceedings and indeed had instructed them to be instituted on 2nd June, 1952, that is some 11 days before the application for process by the Police.

I accepted that assurance given from the Bar and having considered the other Grounds of Appeal and being of the opinion that it was abundantly clear on the evidence that the appellant had in fact committed the offence charged against him, I dismissed the appeal. I intimated, however, that if I were asked to do so I would give my certificate to allow the matter to be taken further.

The real question which arose on the appeal was not any question of what constitutes or does not constitute a valid consent by the Public Prosecutor but what course this Court should take when such a question is raised for the first time on appeal.

In my opinion the answer is to be found in an examination of the two English cases of *Rex v. Bates*[1] and *Rex v. Metz*[2].

In *Bate's* case the appellant was convicted of an offence under the Explosives Substances Act, 1883, for the prosecution of which the consent of the Attorney-General was required. Although the point was not raised at the trial, and was indeed not raised by the appellant himself in the appeal, Counsel for the Crown stated from the Bar that he had ascertained that the consent of the Attorney-General was in fact not obtained. On that, the Court quashed the conviction on the ground that the absence of the consent of the Attorney-General took away the jurisdiction of the trial Court.

In *Metz's* case the appellant had been convicted of an offence against the Trading with the Enemy Act, 1914, for the institution of a prosecution for which the consent of the Attorney-General was necessary. No evidence was given at the trial that such consent had been obtained but at the trial the point of want of consent was not taken. At the hearing of the appeal, Counsel for the Crown informed the Court from the Bar that the *fiat* of the Attorney-General, which apparently was in writing, had been produced at the Police Court and so came to the Court of trial (the Central Criminal Court) attached to the depositions. The appeal was dismissed. In dismissing it Lord Reading, observed that two points had been taken on behalf of the appellant and went on to say :—

"The first is that it is necessary that the consent of the Attorney-General should be given before a prosecution is instituted; under s. 1(4) of the Trading with the Enemy Act. It is not suggested that the prosecution was in fact instituted without the necessary consent, but it is said that there was no evidence of it at the trial. The point was not taken at the trial. As we now know, the consent was in fact proved at the police court. The document was in Court at the trial, but it was not formally proved. If the point had been taken at the trial the defect would have been immediately cured, so the point is a pure technicality. We do not think it possible for the point now to succeed in this Court when there was an opportunity for counsel to take it in the Court below if he desired."

He went on to distinguish the case from that of *Bates supra* as follows :—

"Our attention has been called to the case of Bates, where the objection was taken that consent had not in fact been obtained, which is a totally different matter; it was there pointed out by Lord Alverstone that although the point had not been taken below it was necessary that there should be consent before the prosecution was instituted. No consent had been obtained, so the conviction was quashed."

I was unable to find any distinction in principle between *Metz's* case and the present case. In *Metz's* case the Court accepted the assurance of counsel that the consent of the Attorney-General was in fact in existence and in the present case I accepted the assurance of Counsel that the consent of the Deputy Public Prosecutor (which, it is to be remembered, is not required to be in writing) was in fact in existence before the institution of the prosecution. In the circumstances, I did not feel it was necessary to examine the actual evidence on the point that was given at the trial. If Counsel for the appellant had wished to take the point he should have done so at the trial. If he had done so, it would have been open to the prosecution to ask for an adjournment to enable the Deputy Public

Prosecutor to appear in person when I have no doubt he would have made the same statement as he made at the hearing of the appeal. If an adjournment had not been granted and the point had succeeded the result would have been not an order of acquittal but an order dismissing the complaint and thus it would have been left open to the prosecution to institute further proceedings after a valid consent had been obtained. (See *Hori Ram Singh v. R.*[3]).

I was fortified in this view by certain observations made by Lord Simonds in the case of *Gill v. R.*[4]. In that case their Lordships were concerned *inter alia* with the question of whether a sanction to a prosecution given under section 197 of the Indian Criminal Procedure Code was invalid by reason of the necessary facts not having been laid before the sanctioning authority. An inference had been drawn from certain circumstances that the necessary facts had been laid before the sanctioning authority and Lord Simonds observed :—

"It is an inference, which at this late stage of the proceedings cannot properly be challenged, that the same facts were before the sanctioning authority when the sanction was given. If it was desired to raise such a question, that should have been done at the earliest moment when the prosecution could have supported by evidence the inference which even without it can fairly be drawn."

I would add that I do not think that what I have said is in any way inconsistent with the judgment of the Privy Council in the case of *Morarka v. R.*[5]. In that case the appellant had been convicted under an Indian statute relating to the control of cotton clothing which provided that no prosecution under it should be instituted without the previous sanction of the Provincial Government concerned, and the Court held that the sanction which had in fact been given was defective. The only material before the Court apparently consisted of the evidence given at the original trial and I fail to see that the decision has any bearing on the question at issue in the case of *Rex v. Metz*[2] *supra* or in the present case.

In this connection, I have had occasion to consider my own judgment in the case of *Chong Tuck Loong v. Public Prosecutor*[6], in which I discussed this question of consent under the Prevention of Corruption Ordinance at some length. In that judgment I made the following observations :—

". . . . . if that section (Section 12) is not complied with the Court has no jurisdiction to try offences under the Ordinance, and I do not think it can be said to be complied with unless it is clear either on the face of the proceedings or as a matter of reasonable inference that the Public Prosecutor (or, by reason of section 376 of the Criminal Procedure Code, the Solicitor-General or a duly appointed Deputy Public Prosecutor) has either taken an active part in the prosecution or has consented to the charges brought against the accused after applying his mind at the lowest to the *facta probanda* forming the material of these charges."

In making these observations I was concerned with the particular facts of the case under appeal and my attention had not been invited to *Metz's* case. On further consideration I have come to the conclusion that in making these observations I went too far and that they would more accurately state the law if the words, "either on the face of the proceedings or as a matter of reasonable inference" were omitted.

To avoid misunderstanding and to ensure a full examination of the question, I should say that in my opinion want of consent under section 12 of the Prevention of Corruption Ordinance is not an omission that can be cured by reason of section 422 of the Criminal Procedure Code. On that point to my mind the judgment of the Privy Council in the case of *Morarka v. R.*[6], *supra,* is conclusive. It is true that in that case their Lordships were concerned with section 537 of the Indian Code which does not contain the specific reference to sanctions which occurs in section 422 of our Code. It is to be noted, however, that until 1923 section 537 of the Indian Code did contain a reference to sanctions required under section 195 of that Code (our section 129) which was repealed in that year. An examination of the Indian decisions prior to 1923 (see the cases set out in the *A.I.R.* Commentary of the Indian Criminal Procedure Code at Vol. III pp. 2984-5) shows that the Indian Courts consistently held that the reference was only to sanctions required under the Indian section 195 and did not include sanctions under any other statutory provision.

COURT OF APPEAL (Criminal Reference).

S. P. Seenivasagam for the appellant.

L. Talog Davies (Federal Counsel) for the respondent.

Mathew C.J. : — This is a Reference under section 34 of the Courts Ordinance. The point for our determination is :—

"Whether the consent of the Public Prosecutor in this case was defective and whether the trial of the appellant was thereby a nullity."

We are in complete agreement with the very full and clear grounds of judgment delivered by Thomson J., and there is nothing that we can profitably add to what has been said therein. In consequence, we hold that the consent of the Public Prosecutor in this case is not defective, and that the trial of the appellant was not a nullity.

We would suggest that difficulties of this kind, which might arise in cases where a consent or sanction is required, could be avoided if the practice were adopted of accompanying every application for a summons or a warrant of arrest with the consent or sanction in writing.

Order accordingly.

Solicitors : *S. Seenivasagam & Sons.*